Sheet Metal Workers' International Association, Local Union 104, AFL–CIO *and* Lux Metals, Inc. Case 20–CB–9859

January 17, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On a charge filed by Lux Metals, Inc., the Employer, on January 12, 1995, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 20, issued an amended complaint and notice of hearing dated September 8, 1995. The amended complaint alleges that the Respondent Union violated Section 8(b)(1)(A) and (2) by referring a contractual grievance to arbitration on January 6, 1995, thereby seeking to apply a collective-bargaining agreement, including its union-security provision, to two employees of the Employer whom the National Labor Relations Board has previously determined are not represented by the Respondent in an appropriate unit for purposes of collective bargaining.

On October 17, 1995, the General Counsel, the Respondent, and the Employer filed with the Board a stipulation of facts. The parties agreed that "the formal papers" (i.e., the charge, the pleadings, and related documents), the Decision and Direction of Election in Case 20–RM–2799, dated October 7, 1994, and the stipulation of facts constitute the entire record in this case. The parties further stipulated that they waived a hearing and the making of findings of fact and conclusions of law and the issuance of a decision by an administrative law judge.

On March 12, 1996, the Board issued an order approving the stipulation of facts and transferring the proceeding to the Board. The General Counsel, the Employer, and the Respondent subsequently filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation with an office and place of business in Santa Rosa, California, is engaged in the manufacture of food equipment and the fabrication and installation of sheet metal work. During the calendar year ending December 31, 1994, the Employer, in conducting its business operations, sold goods valued in excess of $50,000 and shipped them from its Santa Rosa, California facility directly to points outside the State of California. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

We further find that the Respondent, Sheet Metal Workers' International Association, Local Union 104, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Employer and the Respondent were parties to a collective-bargaining agreement which sets forth effective dates from July 1, 1992, to June 30, 1995.[1] This agreement included a union-security provision requiring employees covered by the contract to become and remain members of the Respondent. On July 1, 1993, the Employer purchased the Food Production Machine Company (FPMC), an operation which had manufactured food equipment. At the same time, the Employer hired two former FPMC employees, Gerhard Bussey and Brian Ansic, and relocated them and the purchased FPMC production equipment to its Santa Rosa facility, where it already employed one or two workers. Thereafter, both groups of employees sometimes worked on the same projects.

On July 1, 1994, the Respondent filed a contractual grievance against the Employer seeking application of the terms of their collective-bargaining agreement to Bussey, Ansic, and several other individuals working for the Employer. On July 14, 1994, the Employer filed a representation petition in Case 20–RM–2799 seeking a Board election in a unit of production workers at its Santa Rosa facility. On October 7, 1994, the Acting Regional Director for Region 20 issued a Decision and Direction of Election in the representation case, deciding, inter alia, that the parties' collective-bargaining agreement did not establish a bar to an election, and that employees Bussey and Ansic, formerly employed by FPMC, were not accreted into the contractual bargaining unit covered by the parties' collective-bargaining relationship upon their transfer to the Santa Rosa facility. No request for review under Section 102.67 of the Board's Rules and Regulations was filed concerning the Decision and Direction of Election. On November 1, 1994, the Board conducted an election pursuant to the Decision and Direction of Election, and on November 9, 1994, the Regional Director certified, based on the election results, that no labor organization represented a majority of employees in the unit found appropriate.

[1] This agreement was the result of an interest arbitration determination, pursuant to the requirements of the parties' preceding collective-bargaining agreement. Also, the Employer signed a Recognition Agreement in 1991 acknowledging that the Respondent was the exclusive bargaining representative of the Employer's employees in an appropriate unit, based on the written authorization of a majority of the unit employees.

On January 6, 1995, the Respondent referred its contractual grievance to arbitration, pursuant to the grievance/arbitration provision of the collective-bargaining agreement. The Respondent currently seeks, through its grievance, enforcement of the agreement for a time period terminating on November 8, 1994, the day before the certification of results of the Board election above.

B. *Issue*

The issue is whether the Respondent violated Section 8(b)(1)(A) and (2) by seeking to apply the collective-bargaining agreement, including the union-security provision, to employees Bussey and Ansic by means of the referral of its contractual grievance to arbitration on January 6, 1995.

C. *Contentions of the Parties*

The General Counsel contends that the finding in the Decision and Direction of Election that employees Bussey and Ansic were not accreted into the contractual unit represented by the Respondent on July 1, 1993, coupled with the election result rejecting union representation which was certified on November 9, 1994, constitute a finding by the Board that the Respondent ceased to represent any of the Employer's unit employees as of July 1, 1993—the date the Employer consolidated the FPMC work and work force with its own at the Santa Rosa facility. According to the General Counsel, because the Respondent's grievance, which seeks to apply a collective-bargaining agreement with a union-security clause to a group of employees not represented by the Respondent, is incompatible with the asserted Board finding above, its referral of the grievance to arbitration on January 6, 1995, had an illegal objective and violated Section 8(b)(1)(A) and (2). As a remedy, the General Counsel seeks an Order requiring the Respondent to cease and desist from filing grievances of this kind against the Employer and to withdraw the grievance pending in arbitration. The Employer's arguments in favor of finding that the Respondent committed unfair labor practices are consistent with those of the General Counsel. In addition, the Employer requests that the Board order the Respondent to reimburse the Employer for reasonable expenses and legal fees incurred in defending against the Respondent's grievance in arbitration.

The Respondent contends that the amended complaint on its face does not set forth a violation of the Act. The Respondent further argues that the General Counsel has not established that the Respondent, at any relevant time, ceased to be the collective-bargaining representative of the unit employees, including those employees addressed in its grievance.

D. *Discussion*

Initially, it is necessary to clarify the scope of the violations alleged in this case as set forth in the amended complaint. The relevant complaint allegations state that the Respondent violated Section 8(b)(1)(A) and (2) by the referral of its grievance to arbitration, thereby attempting to apply the collective-bargaining agreement, including the union-security provision, to former FPMC employees Bussey and Ansic. There is no reference in the amended complaint to violations involving any employees except these two individuals who were hired by the Employer and put to work at its Santa Rosa location on July 1, 1993. Further, there is no indication on this record—in the stipulation or elsewhere—of an agreement by the parties to this litigation to amend the complaint or otherwise properly expand the allegations to cover other employees of the Employer who were named in the Respondent's grievance. Therefore, our consideration of the alleged unfair labor practices is limited to employees Bussey and Ansic. In addition, the amended complaint states that the alleged unlawful activity occurred on and after January 6, 1995, when the Respondent referred its grievance to arbitration. Accordingly, we will not consider any conceivable unlawful activity which may have occurred prior to that date.

In his Decision and Direction of Election, the Acting Regional Director concluded that the two former FPMC employees were not accreted into the contractual bargaining unit on or after July 1, 1993, the date that they began work for the Employer at the Santa Rosa location.[2] Further, after a Board-conducted election, the Regional Director on November 9, 1994, certified that the Respondent did not represent the Employer's production employees. Therefore, at no relevant time did the Respondent represent employees Bussey and Ansic as bargaining-unit members, nor were they ever covered by the terms and conditions established in the collective-bargaining agreement. Because the Respondent's referral of its grievance to arbitration constituted an insistence on the application of the agreement, including the union-security clause, to these two nonunit employees, the Respondent has restrained and coerced employees within the meaning of Section 8(b)(1)(A) of the Act. By the same conduct, it has attempted to cause the Employer to discriminate against them in violation of Section 8(a)(3), and therefore has engaged in unlawful conduct within the meaning of Section 8(b)(2). *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993); see also,

[2] As stated above, no request for review of the Decision and Direction of Election was filed with the Board. Accordingly, it constitutes a "final decision" under Sec. 102.67 (b) of the Board's Rules and Regulations.

e.g., *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268 (1991).

The fact that the Respondent's conduct occurred within the context of the grievance/arbitration process does not insulate it from unfair labor practice scrutiny in the circumstances of this case. The Respondent's grievance seeking application of the collective-bargaining agreement to Bussey and Ansic was incompatible with the finding in the October 7, 1994 Decision and Direction of Election that the two employees were not an accretion to the bargaining unit. Thus, the Respondent's referral of the grievance to arbitration on January 6, 1995, was for an "illegal objective," and in violation of Section 8(b)(1)(A) and (2). *Rite Aid*, above at 834–835 (discussing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983)); *Pepsi Cola Bottling*, above at 268.

CONCLUSION OF LAW

By referring a contractual grievance to arbitration on January 6, 1995, thereby seeking to apply its collective-bargaining agreement with the Employer, including the union-security provision, to nonunit employees Bussey and Ansic, the Respondent has restrained and coerced employees in violation of Section 8(b)(1)(A), and has attempted to cause the Employer to discriminate unlawfully against its employees, thus violating Section 8(b)(2).

THE REMEDY

Having found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act, we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act. We will order the Respondent to withdraw that portion of the grievance it referred to arbitration on January 6, 1995, which involves employees Bussey and Ansic. In addition, we will order the Respondent to reimburse the Employer for all reasonable expenses and legal fees, with interest,[3] incurred on and after January 6, 1995, in defending against the Respondent's grievance in arbitration, with respect to that portion of the grievance which involves employees Bussey and Ansic. *Rite Aid*, above at 835–836.

ORDER

The National Labor Relations Board orders that the Respondent, Sheet Metal Workers' International Association, Local Union 104, AFL–CIO, Petaluma, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Referring to arbitration any grievance wherein it seeks to apply the terms of its collective-bargaining agreement with Lux Metals, Inc., including the union-security provision, to employees who are not accreted into the contractual bargaining unit.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw that portion of the grievance it referred to arbitration on January 6, 1995, which involves employees Gerhard Bussey and Brian Ansic.

(b) In the manner set forth in the remedy section of this decision, reimburse the Employer for all reasonable expenses and legal fees incurred on and after January 6, 1995, in defending against the Respondent's grievance in arbitration, with respect to that portion of the grievance which involves employees Bussey and Ansic.

(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including its union office and all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward signed copies of the notice to the Regional Director for Region 20 for posting by Lux Metals, Inc., if willing, at its facility in Santa Rosa, California, where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refer to arbitration any grievance in which we are seeking to apply the terms of our collective-bargaining agreement with Lux Metals, Inc., including the union-security provision, to employees who are not accreted into the contractual bargaining unit.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw that portion of the grievance against Lux Metals, Inc., involving employees Gerhard Bussey and Brian Ansic, which we referred to arbitration on January 6, 1995.

WE WILL reimburse Lux Metals, Inc., for all reasonable expenses and legal fees, plus interest, incurred on and after January 6, 1995, in defending against our grievance in arbitration, with respect to that portion of the grievance which involves employees Gerhard Bussey and Brian Ansic.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 104, AFL–CIO